No. 86-929

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ALPHONSE DELLA-DONNA,

Petitioner,

—against—

GORE NEWSPAPERS COMPANY and
HAMILTON C. FORMAN,

Defendants,

GORE NEWSPAPERS COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, FOURTH DISTRICT

PETITIONER'S REPLY BRIEF

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January 13, 1987

TABLE OF AUTHORITIES

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In this libel action petitioner seeks a writ of certiorari on the seemingly ubiquitous public figure doctrine, contending that the decision below has expanded the scope of that doctrine far beyond the First Amendment focus of *New York Times* v. *Sullivan* and that the doctrine needs definitional clarification by this Court in light of the varied treatments of different elements of the doctrine by the lower courts. Rather than challenging either of these contentions,[1] respondent asserts that this is not the proper

[1] Respondent does contend that the "Petition presents no conflicts among the decided cases" (Respondent's Brief in Opposition

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case for the Court to review these issues.[2] Because much of respondent's brief addresses the merits of the decision below and not whether that decision raises issues which should be reviewed by this Court by writ of certiorari, we direct this reply to matters which may bear upon the appropriateness of granting the writ, without presenting a comprehensive argument on the merits of each matter.

1. While respondent fails to show any actual nexus between the alleged defamations and the trustees' rescission of the gift of Unitrust funds, it argues that the defamations concerned petitioner's "myriad positions relating to the Goodwin interests," which, in turn, impacted upon the distribution of the trust funds, which, in turn, had a connection with the controversy (RB5). But even this attenuated, multi-staged attempt to construct a connection is wrong on the facts. Two of the three defamations—payment of "unconscionable" legal fees and bilking the estate of $1.3 million (Petition for Writ ("PB") p. 6), do not involve any trust funds; they relate only to the funds in Goodwin's probate estate. The third defamation, relating to an alleged diversion by petitioner of $9 million from the Unitrust to the estate (PB6), had no possible connection with the rescission of the gift. When the gift was made by the Foundation trustees, they advised the Nova University Board of Trustees, by letter dated May 3, 1976,

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("RB") p. 6). Perhaps respondent overlooked pages 16 through 22 of the Petition which specifically cite and describe the conflicts in the decided cases on the three components of the public figure issue involved in the case at bar: the nature of a public controversy, the required purposeful activity and the required nexus between the defamation and the public controversy.

[2] Respondent does not dispute that the decision below in this case involves all three of the critical requirements for public figure status: public controversy, purposeful activity and nexus.

that quarterly payments for a period of five years beginning May of 1971 had been and were being made from the Unitrust to the Estate pursuant to the terms of the trust. Thus, when the gift was given, it was expressly noted that it did not include the quarterly payments to the estate—the very payments which constitute the $9 million alleged as a diversion more than two years later.[3]

2. Contrary to respondent's contentions, this is not a case where petitioner "courted the public limelight" or used the press to present his views to the public concerning the controversy (RB8). It is uncontroverted that petitioner never held a press conference, never issued a press release, made available to Gore on request one document he had presented to Nova regarding a proposal concerning the issue of local control (*see* App. B at 14a), never circulated that document generally to the media, and never made a statement to Gore's reporters except in response to their questions.

Respondent's efforts to factually support its contentions do not meet that task. First, it argues that petitioner testified that he intended "to use the press as a forum for his views" and quotes a statement from petitioner's deposition (RB2, 8 & n.21). But in the very testimony quoted, petitioner rejects the use of the press, stating that even if the paper published that Nova was controlled by New York, he could not live with the situation (RB2). Thus,

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[3] The decision of the Florida District Court of Appeal, which twice noted the difficulty of designating the "public controversy" in this case (App. A at 9a, 9a-10a), found the "public controversy" in the dispute over local control of Nova University or over its fiscal soundness (*see* App. A at 10a). Not even a tortured, multi-staged, factually impaired analysis could create the appearance of a connection between the defamations at issue and the dispute over local control.

rather than saying he planned to use the media, petitioner indicated why he never regarded the media as a proper forum for the dispute, testifying that putting the facts in the media was no solution. Second, respondent discusses "widely disseminated" charges made by one of the Nova trustees against petitioner. Obviously, the fact that someone has widely disseminated his own charges after receiving a confidential and expressly limited communication from petitioner does not mean petitioner is courting the public limelight. Nor does the fact that petitioner responded to the press' inquiry about those particular charges (RB5 n.10) change the situation.[4] Third, respondent, referring to the deposition testimony of the primary reporter, argues that petitioner was readily available for telephone conferences until "after the matter ended in court." Respondent places that event in late July 1978. In fact, the primary reporter's deposition testimony also states that petitioner was not available for comment or did not respond to messages after "the [settlement] agreement fell apart that had been suggested by Judge Richardson." This event occurred about the 20th of June, 1978. At another point in his deposition, the same reporter testified in regard to the June 3, 1978, (*see* PB6) article that he could not remember whether petitioner "was making himself available for questions concerning these matters" at the time of that article. In any event, that petitioner for one period of time or another made himself available to answer a reporter's questions does not

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[4] Respondent writes "All used the newspaper as a forum for their views" (RB5). In regard to petitioner the record simply shows that during the early period of the legal dispute concerning rescission of the gift, petitioner answered questions from the press and furnished a document to a Gore reporter. That is it, there is nothing else—no matter how hard respondent seeks to recast petitioner's actions.

mean he was using the press to present his viewpoint. Further, respondent asserts that "[t]he majority of the 78 published articles either quote the petitioner or recount his position on the controversy" (RB7). In fact, from the time the dispute over the rescission of the gift was first publicized to the last article some 18 months later, the articles contain only six different quotes from petitioner, two of which were simply denials of the charges by him. The fact that petitioner's statements in response to a reporter's questions are repeated in later articles or that statements in petitioner's legal papers filed in court are quoted or petitioner's position in Court papers on the legal disputes is recounted, does not constitute evidence that "petitioner repeatedly used the newspapers as a forum for his viws" (RB7). At most, this is an example of a media defendant charged with defamation seeking to claim that plaintiff is a public figure because of the defendant's own conduct in publicizing the plaintiff. *Cf. Hutchinson* v. *Proxmire,* 443 U.S. 111, 135 (1979).

3. Respondent is wrong when it portrays petitioner as having purposefully and voluntarily undertaken the type of actions which make him a public figure. The reasoning of the Florida Appellate Court on this issue demonstrates why the writ should issue here. The court below described the actions of petitioner: (1) he participated in designating Nova as a beneficiary of the trust, (2) he negotiated and litigated with Nova when he determined the designation was an error (App. A at 11a). Based on these activities the court found petitioner had "initiated a series of purposeful, considered actions, igniting a public controversy . . ." (*id*). To the court below, then, the activities of petitioner as trustee and lawyer, resulting in a highly publicized legal dispute "igniting a public controversy"

are sufficient to make petitioner a public figure.[5] The court below thus determined that purposeful activity for public figure purposes can consist simply of activities as an attorney or party in a lawsuit where that litigation, or matters raised in it, become a subject of (i.e. ignite) a public controversy. This approach goes far beyond the scope of *Sullivan* protection afforded the media when attorneys or parties are involved, which this Court sought to formulate in *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974) and *Time, Inc.* v. *Firestone*, 424 U.S. 448 (1976). The analysis below also conflicts with the decision in *Waldbaum* v. *Fairchild Publications Inc.*, 627 F.2d 1287 (D.C. Cir.), *cert. denied*, 449 U.S. 898 (1980), the very case relied upon by the Florida appellate court, for in *Waldbaum* the Court specifically noted that "participation in publicized litigation [is not] a sufficient condition for becoming a public figure." 627 F.2d at 1296 n.23.

Nothing presented in respondent's brief[6] alters the critical fact that the decision below affords this Court

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[5] The court below did not point to any participation by petitioner in any public debates, discussions, forums, etc. Rather, the court apparently took the position that petitioner continued to play a prominent role through his continuing activities as trustee and attorney.

[6] Respondent's brief contains an assortment of miscellaneous statements also directed at convincing this Court that this case should not be reviewed. For example, respondent asserts that local control had nothing to do with the grantor's intent (RB2). In fact, the grantor had designated a locally controlled Foundation to determine the disposition of the bulk of his trust and petitioner testified in his deposition with personal knowledge of the grantor's intent to benefit locally controlled institutions.

Respondent portrays the petitioner as acting alone as trustee (RB2). The record is clear that the acts of the Foundation Trustees were done by all three trustees and at no time did petitioner act as a trustee or make a trust decision by himself.

Respondent claims that petitioner acknowledged he had suffered no damages (RB7 & n.18). Respondent entirely ignored peti-

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an opportunity to bring the public figure doctrine in line with the First Amendment focus of *Sullivan* protecting robust public debate on public issues and to supply guidelines to the doctrine in its three essential parts—public controversy, purposeful activity by plaintiff, and nexus between the alleged defamations and the controversy.

CONCLUSION

For all the foregoing reasons and those stated in the Petition, a writ of certiorari should issue to review the judgment and opinion of the District Court of Appeal of the State of Florida, Fourth District.

Respectfully submitted,

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tioner's sworn testimony in 1982 that in the four years since the defamations he had not had a single new client of any substance and that the gross income of his law practice had gone down.

Respondent also states that the reporter testified petitioner never complained about the defamations when they were published (RB9 n.22), disregarding the fact that as to two of the defamations petitioner had denied them before they were published and as to the third the reporter himself testified this may have been when petitioner was not making himself available to the press.